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Supreme Court of the United States

OCTOBER TERM, 1956

No. 405

FRANK MEKOLICHICK, JR., and DAVID CHARLES WENNER, Petitioners

v.

UNITED STATES OF AMERICA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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No.

FRANK MEKOLICHICK, JR., and DAVID CHARLES WENNER, Petitioners

v.

UNITED STATES OF AMERICA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Each petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of conviction of each petitioner by the United States District Court for the Middle District of Pennsylvania for a violation of the Universal Military Training and Service Act.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. 15, *infra*) is not yet reported. The opinion of the District Court in the *Wenner* case is reported (134 F. Supp. 447). [RM 31a; RW 35a][1] (Appendix D, *infra*, page 24)

[1] Numbers herein within brackets preceded by "RM" refer to pages of printed record in *Mekolichick* case; numbers herein within brackets preceded by "RW" refer to pages of printed record in *Wenner* case.

JURISDICTION

The judgment of the Court of Appeals was entered in each of these cases on June 1, 1956. (See Appendix B, *infra*, page 21.) A petition for rehearing was filed and denied on August 15, 1956. (See Appendix C, *infra*, page 23.) The time for filing this petition for writ of certiorari expires September 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37 (b)(2) and 45 (a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Whether the refusal of the trial court to pass upon point one of the motion for judgment of acquittal (in which petitioners asserted that they were denied procedural due process of law by the local board on oral hearings at personal appearances before the local board, the holding being made because petitioners at their trial withdrew their contention that there was no basis in fact for the denial of their claims for exemption as ministers of religion by the local board) constituted a denial of procedural due process of law by the District Court in the trial of these criminal cases of such serious nature as to require a reversal of the judgments and a remand of the cases for a new trial.

II.

Since the regulations deny the help of legal counsel before the local board but guarantee, in lieu thereof, assistance to registrants by local board advisors, did the local boards deny petitioners procedural due process of law and invalidate each order to report for civilian work in each case by not informing petitioners of the right of assistance by advisors through posting the names of advisors to registrants conspicuously in the local board office as

required by Section 1604.41 of the Selective Service Regulations?

SELECTIVE SERVICE REGULATIONS INVOLVED

Section 1604.41 of the Selective Service Regulations (32 C. F. R. § 1604.41) reads:

> "Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

Section 1624.2 of the Selective Service Regulations (32 C. F. R. § 1624.2) reads as follows:

> "Appearance Before Local Board.—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the 'Minutes of Actions of Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100).
>
> "(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he be-

lieves will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

"(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

"(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

"(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification."

STATEMENT OF THE CASES

These criminal actions were started by indictment charging each petitioner with a violation of the Universal Military Training and Service Act and the regulations thereunder for failing to perform civilian work as conscientious

objectors in lieu of induction into the armed forces. [RM 3a; RW 4a] The indictments charged that each petitioner left and quit his civilian work "at the Mont Alto State Tuberculosis Sanatorium at South Mountain, Pennsylvania, to which he had been duly assigned by his local board." [RM 3a; RW 4a] Each petitioner on arraignment pleaded not guilty and waived the right of trial by jury. [RM 1a; RW 1a]

Each case was tried on June 29, 1954. [RM 1a, 4a; RW 1a, 5a] The cases were taken under advisement and motions for judgment of acquittal were filed September 13, 1954. [RM 30a-31a; RW 31a-32a] On September 29, 1955, the trial court filed an opinion in each case, ordered the motion for judgment of acquittal denied in each case and entered a finding of guilty in each case. [RM 1a, 31a-37a; RW 2a, 35a-41a]

The trial court refused to pass upon ground one of the motion for judgment of acquittal [RM 30a-31a; RW 32a-33a] raising a question of the denial of procedural due process of law by the local board which holding was made because the petitioners withdrew their contention that there was no basis in fact for the denial of their claims for exemption as ministers of religion. [RM 36a-37a; RW 41a] This holding was in effect that, because petitioners could not show they had been illegally classified by the local board, they could not complain of and obtain judicial review of the denial of procedural due process of law by the local board.

Thereafter on November 22, 1955, the trial court entered a judgment in each case sentencing each to serve a period of three years. [RM 2a, 37a; RW 3a, 42a] Notices of appeal were duly filed in each case. [RM 38a; RW 43a]

The Court of Appeals filed its opinion and rendered judgment affirming the judgments of conviction without saying anything about the denial of procedural due process of law by the trial court in refusing to consider the first ground of the motion for judgment of acquittal. (See Ap-

pendix A, *infra*, pages 16-20.) This failure on the part of the Court of Appeals was complained of by petition for rehearing, which was denied on August 15, 1956.

Draft Board Proceedings

Mekolichick

Mekolichick was born September 30, 1932. [RM 10a] He registered with his local board and was mailed a classification questionnaire which he filled out. [RM 10a-15a] This showed he was a minister of religion. [RM 12a] He also answered that he was a conscientious objector. [RM 14a] The local board mailed to him the special form for conscientious objector. [RM 14a] This form was filled out, returned and filed with the local board. [RM 16a-21a] It showed that he was opposed to both combatant and noncombatant military service. [RM 16a-21a]

The local board on October 23, 1951, denied Mekolichick the minister's exemption and the conscientious objector status. He was classed as liable for unlimited military training and service, being placed in Class I-A. [RM 14a] He requested a personal appearance which was conducted on February 3, 1953. [RM 15a]

Upon the personal appearance Mekolichick was asked certain questions pertaining to his ministry. [RM 22a] He wanted to give the board reasons why he was entitled to the minister's classification. He desired to tell the local board about his work as a minister. When he attempted to do so, a board member stated: "We are familiar with your religion." [RM 9a] Mekolichick then responded that he was there to tell them why he was a minister. Then a board member said: "We don't doubt that you are a minister." [RM 9a] Mekolichick said he was cut off from giving any more information about his ministry. [RM 6a]

Mekolichick had a written outline of points that he intended to cover concerning his ministry upon the personal appearance. But he could not give this new information because he was cut off by the board. [RM 7a] The only

question permitted to be answered that even indirectly touched upon his ministry was "would you be willing to serve in some other capacity, such as do malaria control work in Mexico?" [RM 7a] Mekolichick said: "I must confine my activities to my preaching position. I follow in his example in doing what I am doing now." [RM 7a-8a, 22a]

Mekolichick said that he did not get to give the beginning portion of his outline of testimony before the local board. He stated that he had an affidavit and notes "that I sent along with my Questionnaire." [RM 8a] He desired to show the board the contents of his file that showed that he was a minister but the board did not allow him to point out "the contents of the draft board file." [RM 8a]

Mekolichick also testified that the draft board did not have posted the names and addresses of advisors to registrants. He made an inspection of the bulletin board where notices were posted and such notice was not there. [RM 9a] No member of the local board ever told him that they had an advisor to registrants. Mekolichick was reclassified and appealed to the appeal board. [RM 15a] Thereafter the appeal board classified him in Class I-O. [RM 15a] This classification made him liable for alternate civilian work in lieu of induction into the armed forces.

He was ordered to perform work at Mont Alto State Tuberculosis Sanatorium, South Mountain, Pennsylvania. [RM 15a] He reported, undertook the work and was classified I-W. [RM 15a] This classification signified that he was regularly employed in alternate civilian work. [RM 15a] He continued in this work until June 8, 1954, when he stopped in at the personnel office and resigned. He did four months' civilian work, but left the hospital on that date. [RM 5a]

Wenner

Wenner was born August 29, 1931. [RW 11a] He registered, and was mailed a classification questionnaire on March 16, 1951. [RW 11a] This was filled out and returned

to the local board for filing. [RW 11a-14a] Wenner showed that he was a student preparing for the ministry. [RW 12a] He also showed that he was a conscientious objector. [RW 14a] The local board mailed him a conscientious objector form. [RW 15a] This form was filled out and returned by Wenner to the local board and filed. [RW 16a-22a]

The local board classified Wenner I-A on June 5, 1951. [RW 15a] Upon receipt of notice of such classification he requested a personal appearance. This was granted and scheduled for July 10, 1951. [RW 15a] Upon the occasion of this personal appearance Wenner had no opportunity to discuss his ministerial status. [RW 7a] He started to explain that he was a minister and quoted the Bible. [RW 7a] A board member stated that he was not interested as far as the Bible was concerned and said that he wanted to know "what right he had under the law to request" the conscientious objector status. [RW 7a]

Wenner would have told the board that he believed in the Bible, which commanded a Christian not to desire "to be part of the world." [RW 8a] Wenner went to the board for the purpose of pointing out things in his file that showed he was a minister or a student preparing for the ministry. He did not get a chance to point that out, although he desired to do so. [RW 8a] The board did not restrain Wenner from filing additional written information. [RW 9a] The board did not give him ample opportunity to say what he wanted to say about his ministry not being interfered with. [RW 9a-10a] The board told Wenner that they did not want to hear him talk about the Bible concerning his ministry. [RW 10a] Wenner testified: "I said that is what my claim is based on, the Bible; that is where I get my authority from." [RW 10a] The board prevented him from telling what he would have told them concerning his ministerial status. [RW 10a]

It was stipulated that Wenner would give testimony similar to that of Mekolichick in the companion case concerning the failure of the local board to post the names

and addresses of advisors for registrants, his inspection of the bulletin board at the local board and the fact that no board member told him that they had advisors for registrants. [RW 34a]

The local board classified Wenner I-A. The case was appealed to the appeal board, but thereafter was returned to the local board for a further hearing. [RW 15a] A new hearing was scheduled on November 25, 1952, before the local board. [RW 15a] Wenner testified that upon the occasion of the second personal appearance he did not have an opportunity to discuss his ministerial status in addition to his conscientious objector status. [RW 7a] The board thereafter forwarded the folder to the appeal board for decision pursuant to the appeal previously taken by appellant Wenner on July 19, 1951, without notifying him and without reclassifying him. [RW 15a]

Thereafter the appeal board, considering a recommendation of the Department of Justice, classified Wenner I-O, of which he was notified. [RW 15a-16a]

Wenner was ordered to do alternate civilian work at the Mont Alto State Tuberculosis Sanatorium at South Mountain, Pennsylvania. [RW 16a] He thereafter reported for work and was classified I-W. [RW 16a] Wenner resigned, turned in his key and left the hospital. [RW 6a]

REASONS FOR GRANTING THE WRIT

The failure of the court below to reverse the judgments and remand them for a new trial because of the error committed by the trial court in failing to pass upon a point raised in the motion for judgment of acquittal is in direct conflict with *Gerdes* v. *Lustgarten*, 266 U. S. 321, 327; compare *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293; *Musser* v. *Utah*, 333 U. S. 95; *Borax Consolidated* v. *City of Los Angeles*, 296 U. S. 10, 21. It is a fundamental rule of law that, when a point is presented to the lower court but is not considered by it, the judgment must be vacated and the case remanded for the purpose of passing

upon such point. (*Musser* v. *Utah*, 333 U. S. 95; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293; *Gerdes* v. *Lustgarten*, 266 U. S. 321, 327) In the latter case the Court said:

> ". . . But since they were not expressly decided by the District Court, we conclude that, under all the circumstances, we should take the course adopted in *Marconi Wireless Co.* v. *Simon*, 246 U. S. 46, 57, that is, reverse the decrees in both the courts below and remand the case to the District Court."

The trial court erroneously held that each petitioner by withdrawing "any contention that the draft board illegally denied the ministerial claim because it was without merit," withdrew "Claim No. 1" of the motion for judgment of acquittal in each case, which was that the local board denied petitioners procedural due process of law contrary to Section 1624.2 of the Selective Service Regulations by denying a full and fair hearing. [RM 36a-37a; RW 41a]

Each petitioner in his motion for judgment of acquittal contended that he was denied rights guaranteed by Section 1624.2 of the Selective Service Regulations upon the occasion of the personal appearance. [RM 30a-31a; RW 32a-33a] The trial court refused to pass upon ground number one presented in the motions for judgment of acquittal.

It is quite obvious that there was no waiver or withdrawal of ground one of the motion for judgment of acquittal. Ground one was about the denial of a full and fair hearing upon personal appearance relative to the claim for ministerial exemption. It has many times been held that even a registrant with a claim wholly without merit is entitled to due process of law upon personal appearance. (*United States* v. *Zieber*, 3rd Cir., 161 F. 2d 90 (1947); *United States* v. *Stiles*, 3rd Cir., 169 F. 2d 455 (1948)) The question of whether there is merit to the claim made for

exemption by each petitioner is entirely irrelevant and immaterial to the right to have a full and fair hearing guaranteed by the regulations. (*Knox* v. *United States*, 200 F. 2d 398 (9th Cir. 1952)) It is a fundamental proposition of law that even the guilty are entitled to have their procedural rights granted upon a trial. A denial of these rights cannot be cured as harmless error solely on the grounds that the defendant is guilty.—*Kotteakos* v. *United States*, 328 U. S. 750 (1946).

On the same theory it was improper for the trial court to conclude that the petitioners withdrew or waived their rights to a consideration of the question about the denial of the full and fair hearing before the local board upon personal appearance, when they undertook to present their claims for exemption as ministers of religion.

Section 1624.2 (b) of the Selective Service Regulations (32 C. F. R. § 1624.2 (b)) guaranteed each petitioner the following rights: (1) to "discuss his classification," (2) to "point out the class or classes in which he thinks he should have been placed," (3) to "direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight," and (4) to "present such further information as he believes will assist the local board in determining his proper classification."

The undisputed evidence shows that each petitioner was denied two of these rights. They were refused the right to go through the draft board file and turn up evidence that they believed the local board had overlooked or to which it had paid no attention. They were also denied the right to present further information they believed would assist the local board in determining whether they were entitled to the ministerial classification.

Because of the violation of this fundamentally guaranteed right, contrary to Section 1624.2 (b) of the Selective Service Regulations by the local board, the motion for judgment of acquittal should have been granted in each

case. (*Davis* v. *United States*, 199 F. 2d 689 (6th Cir. 1952); *Bejelis* v. *United States*, 206 F. 2d 354 (6th Cir. 1953); compare *Davis* v. *United States*, 203 F. 2d 853 (8th Cir. 1953)) In the latter case there was a dispute of fact on the question. The testimony of the appellant was contradicted by the draft board record. In these cases there is no such contradiction in the record. The Government did not call the members of the draft board to contradict either of the petitioners upon this point because petitioners conceded that there was no denial of the ministerial claim without basis in fact or contrary to law. [RM 36a-37a; RW 41a]

The cases are legion where the courts have invalidated draft board orders for a denial of procedural due process of law even though it was held that the classification was not illegal. (*Simmons* v. *United States*, 348 U. S. 397 (1955); *Gonzales* v. *United States*, 348 U. S. 407 (1955); *United States* v. *Zieber*, 161 F. 2d 90 (3rd Cir. 1947); *United States* v. *Stiles*, 169 F. 2d 455 (3rd Cir. 1948); *Berman* v. *Craig*, 207 F. 2d 888 (3rd Cir. 1953)) This principle has been applied in cases where there has been a denial of rights granted upon personal appearance. (*United States* v. *Stiles*, 169 F. 2d 455 (3rd Cir. 1948); *Knox* v. *United States*, 200 F. 2d 398 (9th Cir. 1952); *Davis* v. *United States*, 199 F. 2d 689 (6th Cir. 1952); *Bejelis* v. *United States*, 206 F. 2d 354 (6th Cir. 1953)) In the opinion of the Court of Appeals it is said: "It was conceded in the district court that the ministerial status contentions were without merit and they were withdrawn. The allegation of lack of due process in connection with them was however reserved." (*Infra*, p. 18) Notwithstanding what is there said, the Court of Appeals never passed upon the question.

It is respectfully submitted that the trial court committed error that can be cured only by reversing and remanding the cases to the trial court, so that the petitioners can have their day in court before the initial fact-finding body of the federal judiciary upon the issue raised by

ground one of the motion for judgment of acquittal in each case.

Failure of the Court of Appeals to consider and pass upon the question is itself a compounding of the denial of procedural due process of law by the trial court. The petitioners are entitled to have their day in this Court and get the considered opinion of the Court on the important and substantial question.

In the event that this Court fails to find a conflict between the holding of the Court of Appeals and the holding of this Court above cited (*Gerdes* v. *Lustgarten*, 266 U. S. 321, 327) then petitioners say that the question of whether the trial court denied petitioners their procedural due process of law on the trial of these criminal cases by refusing to pass upon ground one of the motion for judgment of acquittal is, for the reasons above stated, an important question of federal criminal procedure that has not been but which ought to be determined by this Court.

Another reason that it is an important question is that each year several hundred criminal cases involving violations of draft board orders are tried in the federal district courts. The holding of the trial court disrupts and confuses the procedure followed in the trials of such cases. It has always been heretofore considered that an accused in such cases could complain of the denial of his procedural rights by local draft boards without having to show or contend that he had been also illegally classified. (*Simmons* v. *United States*, 348 U. S. 397 (1955); *Gonzales* v. *United States*, 348 U. S. 407 (1955)) But the holding of the trial court, approved by the Court of Appeals, is a departure from the present method of trying this type of criminal case where questions of the denial of procedural due process of law by the local boards are involved. The confusion that will follow the approval of the aberration makes the question of the utmost national importance. This is of such great magnitude that it requires this Court to con-

sider the problem, grant the writ of certiorari and decide the question.

CONCLUSION

This Court should grant the writ of certiorari to review the judgments of conviction for the reasons above stated.

Respectfully submitted,

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September, 1956.

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,794

UNITED STATES OF AMERICA

v.

FRANK MEKOLICHICK, JR.,

Appellant

No. 11,795

UNITED STATES OF AMERICA

v.

DAVID CHARLES WENNER,

Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Argued April 13, 1956

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 1, 1956)

By McLaughlin, *Circuit Judge.*

These two Selective Service cases present the same major problem with an additional proposition raised in the Wenner appeal.

In Mekolichick, the registrant asserted he was a minister of religion and a conscientious objector. The board denied both claims. He was given a personal hearing, thereafter reclassified as I-O and assigned to civilian work. He reported, undertook the hospital work assigned him and was classified I-W. He worked about four months and then left the hospital. At the trial Mekolichick testified that he made an inspection of the bulletin board of the draft board and there were no names and addresses of advisors to registrants posted.

Wenner in his questionnaire stated he was a student for the ministry and a conscientious objector. He was classified I-A, given a personal appearance hearing and the classification continued. On appeal the matter was sent back to the local board which, without reclassifying the registrant, returned the file to the appeal body. The appeal board classified Wenner as I-O and assigned him to hospital work. He reported for work and was classified I-W. He stayed for something less than a month, turned in his key and left the hospital.

It was stipulated that Wenner would give the same testimony as Mekolichick regarding his inspection of the bulletin board and that no notice of names and addresses of advisors to registrants was posted nor did any board member tell him they had advisors for registrants.

The common point is that the local board denied appellants procedural due process of law and invalidated the work orders by failing to post the names of advisors to registrants conspicuously in the local board office as required by Section 1604.41 of the Selective Service Regulations (32 C.R.F. § 1604.41). That section at the time read:

"Advisors to registrants shall be appointed by

> the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

The section was amended on February 3, 1955 by changing the word "shall" in the first sentence to "may", making the appointment of advisors discretionary with the Director.

It is true that the trial court found as to both defendants that "It is the undisputed testimony of the defendant that the list of advisors was not published as provided for in the Regulations." However, it is also true that there is no testimony by Mekolichick or anyone else as to whether there was a list posted at the time these matters were pending before the Selective Service. The record rather indicates that the check up by Mekolichick was made after his claim had been completely processed; certainly there is enough to require the return of these appeals to the district court to clarify that issue if it were dispositive here. But there is no necessity to follow that procedure for, assuming that the names and addresses of advisors were not posted, under the admitted facts, these cases are without merit.

Plainly there was no denial by the board of assistance to these registrants. If, as is now circuitously argued for them, they did inspect the bulletin board for a list of advisors while their claims were being considered they knew of that procedure but never requested a list or other assistance.

What really occurred in these claims is that Selective Service painstakingly passed upon everything appellants

had to offer. The facts and proper inferences therefrom strongly indicate expert assistance to appellants in the preparation of their answers to the questionnaries and that nothing was neglected in the full presentation of their claims. If there was failure to post a notice of the names and addresses of advisors that omission did not cause harm in any degree to appellants.

It was conceded in the district court that the ministerial status contentions were without merit and they were withdrawn. The allegation of lack of due process in connection with them was however reserved. Registrants were ultimately upheld in their stand as conscientious objectors and assigned to hospital employment at the Pennsylvania Tuberculosis Sanitorium. Both of them regularly reported for duty. Mekolichick worked four months and quit. He gave as the reason at that time "it [was] his duty to be a minister regardless of consequences." Wenner qualified for a hospital position and was so classified. Within a month he, too, left. The reason he stated for his act was that the position interfered with his ministerial duties.

In other words, despite the assumed failure to post the names of advisors, these appellants, after exhaustive Selective Service hearings, were allowed exactly what they sought. Irrespective of this conceded result it is argued on their behalf that the alleged failure to post names of advisors was fatal as a violation of due process. Our Zeiber and Stiles opinions[1] are erroneously cited as supporting this assertion. In both those decisions the violation of the procedural regulation prejudiced the rights of the registrants. The Hagaman and Witmer cases in this circuit[2] are much more in point. Although the particular regulation there involved was not technically observed no prejudice to the defendants was found. Witmer's conviction was sustained and Hagaman reversed on other grounds. As was

[1] United States v. Stiles, 169 F. 2d 455 (3 Cir. 1948); United States v. Zieber, 161 F. 2d 90 (3 Cir. 1947).

[2] United States v. Hagaman, 213 F. 2d 86 (3 Cir. 1954); United States v. Witmer, 213 F. 2d 95 (3 Cir. 1954).

said in the latter opinion at page 91: "* * * where there has been substantial compliance, so that a man has had all the consideration due him, the courts have refused to reverse for mere technical irregularities. That we believe, works substantial justice."[3] In United States v. DeLime, 223 F. 2d 96 (3 Cir. 1955), registrant had not been furnished with a fair resumé of the F.B.I. report and the lack of due process was urged. This court in upholding the conviction said at page 101: "* * * the defendant in the instant case could not have been prejudiced by the failure to furnish him with a fair resumé because the denial of conscientious objector status was necessitated by his own statements and was not based on any rebuttal information acquired from other sources as in Simmons. This is not a case where, despite a lack of prejudice, proceeding must be vitiated if procedural requirements are not met."

The exact situation was before the Ninth and Sixth Circuits very recently. In Uffelman v. United States, 230 F. 2d 297, 302 (9 Cir. 1956), the court held, "Since no prejudice is shown to have resulted from the Local Board's failure to have the Director of Selective Service to appoint 'advisors to registrant' and its consequent failure to post the names of such advisors in its office, we hold that there is no merit to this first 'question' presented by the appellant." And in Rowton, et al. v. United States, 229 F. 2d 421, 422 (6 Cir. 1956), cert. den. May 14, 1956, the court in affirming convictions held, "The failure of the local board to post the names of advisors to registrants as required did not operate to the prejudice of these appellants. 28 U. S. C. A. § 2111 Fed. Rules Crim. Proc. rule 52(a). 18 U. S. C. A. They were not denied a fair and reasonable opportunity to present their claims."

The point separately argued on behalf of appellant Wenner is alleged denial of due process because the local board

[3] Though this language appears in the partial dissent of Judge Goodrich, it represents "the opinion of all the members of the Court." (p. 90).

did not notify him prior to sending his file to the appeal board.

Wenner's file at his request was forwarded the appeal board on July 20, 1951. It was returned to the local board July 23, 1951. "Without action". The reason for this is not mentioned in the "Minutes of Action by Local Board and Appeal Board" or otherwise in the record. The local board scheduled another hearing for November 25, 1952. On that date the entry in the minutes reads, "Reg. reported for hearing. Bd. requested folder be forwarded to Appeal Board *for decision, per request 7/19/51, registrant.*" (Emphasis supplied). The file having come back from the appeal board without action by that body and apparently through misunderstanding or clerical error, it was again set down for hearing by the local board. On the fixed date, since the appeal board had not passed upon the case as requested by registrant, *the file was again forwarded that tribunal for its consideration.* This course was precisely in accord with the expressed wish of registrant and presumably decided upon in his presence when the local board was faced with the fact that the appellate group had not yet considered the merits of the appeal. There was undoubtedly actual notice to registrant but aside from that there was no prejudice to him. The facts in Hagaman and Witmer, supra, were quite similar with no formal reclassification or notice by mail thereof. As in those cases Wenner had knowledge of the board's action and he did have his appeal. The board functioned admirably in this instance. It insisted that registrant be allowed his full rights and he was. Under the facts the detail overlooked by the board was not important. Martin v. United States, 190 F. 2d 775 (4 Cir. 1951); Atkins v. United States, 204 F. 2d 269 (10 Cir. 1953).

The judgments of the district court will be affirmed.

APPENDIX B

Judgment—Mekolichick Case

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,794

UNITED STATES OF AMERICA

vs.

FRANK MEKOLICHICK, JR.,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN and STALEY, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in the cause be and the same is hereby affirmed.

Attest: IDA O. CRESKOFF, *Clerk*

June 1, 1956

Judgment—Wenner Case

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,795

UNITED STATES OF AMERICA

vs.

DAVID CHARLES WENNER,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN and STALEY, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court in the cause be and the same is hereby affirmed.

Attest: IDA O. CRESKOFF, *Clerk*

June 1, 1956

APPENDIX C

Order Denying Joint Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,794

UNITED STATES OF AMERICA

v.

FRANK MEKOLICHICK, JR.,

Appellant

No. 11,795

UNITED STATES OF AMERICA

v.

DAVID CHARLES WENNER,

Appellant.

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge,* and MCLAUGHLIN and STALEY, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

MCLAUGHLIN

Circuit Judge

Dated: August 15, 1956.

APPENDIX D

Opinion of District Court—Mekolichick Case

Defendant, Frank Mekolichick, Jr., has been indicted for wilfully refusing to perform civilian work contributing to the maintenance of the national health, safety and interest, to wit, by quitting such civilian work at Mount Alto State Tuberculous Sanatorium at South Mountain, Pennsylvania, to which he had been assigned by his Local Draft Board, all in violation of the Universal Military Training and Service Act, 50 U. S. C. A. App. Sections 451-470, and the Selective Service Regulations duly issued pursuant thereto and then in full force and effect. Defendant entered a plea of not guilty and waived his right to trial by jury. The case was accordingly tried to the Court without a jury.

At the trial the Government produced the file of Local Board No. 94 of Hazleton, Pennsylvania, being its complete file in relation to this defendant. An examination of the file reveals that defendant filed his Selective Service System Classification Questionnaire with his Local Board October 10, 1951, in which he requested a IV-D (ministerial) classification and also requested that he be furnished Special Form for Conscientious Objector (SSS Form No. 150).

On October 12, 1951, defendant filed SSS Form No. 150 in which he signed Series I (B) "Claim for Exemption" and in which he asserted that he was conscientiously opposed to participation in war in any form and to participation in noncombatant training or service in the armed forces, and requested exemption therefrom. Both the Questionnaire and Form No. 150 were implemented by statements setting forth the basis of his claim.

On October 23, 1951, his Local Board classified defendant I-A. On October 25, defendant wrote to the Local Board stating that he wanted to appeal his classification of I-A and desired a personal hearing before the Board.

Defendant was given a personal hearing by the Board on February 3, 1953, after which he was again classified I-A by the Local Board. On February 9, 1953, defendant wrote to the Local Board appealing from his I-A classification and stating, inter alia, "I believe that a classification of I-O could have been given me, by the local board at the least."

The file was forwarded to the Appeal Board and thence to the Hearing Officer. Defendant appeared before the Hearing Officer with three witnesses. Following the hearing the Hearing Officer concluded that defendant was conscientiously opposed to combatant and noncombatant duty by reason of religious training and belief and recommended a I-O classification. The Department of Justice concurred and on June 29, 1953, recommended to the Appeal Board that defendant be classified I-O. On July 15, 1953, the Appeal Board by unanimous vote classified defendant I-O.

Defendant was furnished SSS Form No. 152 (Special Report for Class I-O Registrants) which he filled out in considerable detail and returned to the Local Board July 28, 1953. In due course he was assigned to civilian work at Mount Alto State Tuberculosis Sanatorium at South Mountain, Pennsylvania. He accepted the assignment and reported for work on September 11, 1953. After serving approximately four months he quit work and left the Sanatorium on January 8, 1954, stating his refusal to perform this civilian work any longer.

Defendant now claims,

(1) The Local Board denied him procedural due process when it refused him the right to discuss his ministerial status.

(2) The Local Board denied him procedural due process in failing to post notice of the names and addresses of advisors to registrants in a conspicuous place in the office of the Board.

(3) The order of the Local Board to perform civilian

work at the State Sanatorium and Sections 1660.1 and 1660.20 of the Selective Service Regulations are in conflict with the Act because the work is not national or federal work as required by the Universal Military Training and Service Act.

(4) The Act and Regulations violate the Thirteenth Amendment to the United States Constitution.

(5) The Act and Regulations violate the Fifth Amendment to the United States Constitution.

In his reply brief defendant states as follows:

> "The Government on page 1 of its brief states erroneously that the defendants claim that they should be classified as ministers. While the defendants claimed as registrants before the board that they should be classified as ministers, it is not here contended in the defense, in the motion for judgment of acquittal or in the main brief for the defendants, that there was a denial of the ministerial status without basis in fact. This Court, therefore, does not have to consider whether there was a denial of the ministerial status by the local board in an arbitrary and capricious manner. The statement at the bottom of page 1 of the Government's brief should therefore be disregarded."[1]

In United States v. Niles, D. C. N. D. Cal., 122 F. Supp. 382, in refusing a motion for acquittal, the court held that the Universal Military Training and Service Act, § 6(j), 50 U. S. C. A. App. § 456(j), providing for assignment of conscientious objectors to civilian work contributing to the maintenance of national health, safety or interest, authorized assignment of objector to institutional work with

[1] The use of the plural in the above quotation was because the same brief was also filed by same defense counsel in United States of America v. David Charles Wenner. The cases involved the same Local Board, and were tried at the same time.

county department of charities and that the statutory provision as thus applied did not violate either the Fifth or Thirteenth Amendments of the United States Constitution. The Court of Appeals (9 Cir., 220 F. 2d 278) affirmed and certiorari was denied (349 U. S. 939).

The work assignment in the instant case was to a facility owned by the Commonwealth of Pennsylvania and operated as a part of its health program. It is, therefore, completely within the purview of the Niles case.

Defendant has frankly, and in my opinion very properly, withdrawn Claim No. 1 (ministerial). As to Claims No. 3 (work not national), No. 4 (13th Amendment), and No. 5 (5th Amendment), I am in full accord with the opinion of the court in United States v. Niles, supra. We have, therefore, for consideration only his Claim No. 2, namely, denial of procedural due process in failing to post notice of the names and addresses of advisors to registrants in a conspicuous place in the office of the Local Board. I find absolutely no merit in this claim.

Section 1604.41 of the Selective Service Regulations as originally promulgated and effective during the period involved in this case reads as follows:

> "Appointment and Duties.—Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

On February 3, 1955, this section was amended by changing

the fourth word in the first sentence from "shall" to "may", so that presently the appointment of advisors to registrants rests in the discretion of the Director.[2]

It is the undisputed testimony of the defendant that the list of advisors was not published as provided for in the Regulations. The requirement of publication is not constitutional in origin but rather is derived solely from the Universal Military Training and Service Act and the Regulations issued thereunder.[3]

In appealing from the I-A classification, defendant said, "I believe that a classification of I-O could have been given me, by the local board at least." He was given that classification; he prepared in great detail and filed with his local Board SSS Form No. 152 (Special Report for Class I-O Registrants); he accepted the assignment and reported for work and after serving approximately four months, he quit and now complains that he was not apprised of the names and addresses of advisors whom he might have consulted. Having received the very classification that he asked for, defendant was not prejudiced by the failure of the Local Board to publish the list of Selective Service advisors, as provided by the regulations.[4]

Defendant's motion for judgment of acquittal will be denied.

September 29, 1955

(s) FREDERICK V. FOLLMER
United States District Judge

[2] E.O. 10594, 20 F.R. 735, Feb. 3, 1955.

[3] United States v. Thomas Louis DeLime III, 3 Cir., 223 F. 2d 96.

[4] United States v. Thomas Louis DeLime, supra. Counsel for defendant relies heavily on William Chernekoff, Jr. v. United States of America, 9 Cir., 219 F. 2d 721. Under the facts of the instant case I feel Chernekoff has been completely answered by DeLime.

Opinion of District Court—Wenner Case

Defendant, David Charles Wenner, has been indicted for wilfully refusing to perform civilian work contributing to the maintenance of the national health, safety and interest, to wit, by quitting such civilian work at Mount Alto State Tuberculous Sanatorium at South Mountain, Pennsylvania, to which he had been assigned by his Local Draft Board, all in violation of the Universal Military Training and Service Act, 50 U. S. C. A. App. Sections 451-470, and the Selective Service Regulations duly issued pursuant thereto and then in full force and effect. Defendant entered a plea of not guilty and waived his right to trial by jury. The case was accordingly tried to the Court without a jury.

At the trial the Government produced the file of Local Board No. 94 of Hazleton, Pennsylvania, being its complete file in relation to this defendant. An examination of the file reveals that defendant filed his Selective Service System Classification Questionnaire with his Local Board March 14, 1951 in which he requested a IV-E (conscientious objector opposed to both combatant and noncombatant training and service) classification and also requested that he be furnished Special Form for Conscientious Objector (SSS Form No. 150).

On March 26, 1951 defendant filed SSS Form No. 150 in which he signed Series I (B) "Claim for Exemption," and in which he asserted that he was conscientiously opposed to participation in war in any form and to participation in noncombatant training or service in the armed forces, and requested exemption therefrom. Both the Questionnaire and Form No. 150 were implemented by statements setting forth the basis of his claim.

On June 5, 1951 his Local Board classified defendant I-A. On July 10, 1951 defendant was given a personal hearing before the Board, after which he was again classified

I-A by the Local Board. On July 19, 1951 defendant wrote to the State Appeal Board appealing from his I-A classification and stating, inter alia:

> "At this time I wish to appeal my classification of I-A given to me by Local Board #94 in Hazleton, Pennsylvania. I am entitled to the classification of Conscientious Objector, IV-E, and hope that you gentlemen will weigh the following facts carefully and without prejudice as to my claim to the IV-E classification:"

He follows this statement by quoting in part Section 1622.20 relating to Class IV-E, then sets forth his position as a conscientious objector, citing a number of quotations from the Bible. He ends his letter as follows:

> "Due to these truths brought to this Board's attention, it would be well in the Lord's sight to give a fair and just decision as to my claims as a conscientious objector."

On November 19, 1952 defendant addressed the following letter to his Local Board:

> "In my previous letter, I was appealing for a IV-E classification. I am now informed that this classification no longer exists.
>
> "I am conscientiously opposed, by reason of my religious training and beliefs, to both combatant and noncombatant training and service in the armed forces.
>
> "I am, therefore, appealing my classification of I-A to that of a conscientious objector available for civilian work contributing to the maintenance of the national health or safety."

On November 25, 1952 he was granted a second hearing before the Local Board. The minutes of this meeting record the following colloquy:

> "We have all your other information you gave us too. Is there anything else you would like to present to the Board at this time? The classification I had in mind—the gentleman stated I should write in for a I-A-O, but the classification I really want I found out later is I-O."

It would seem from the above that the defendant not only asked for the very classification which he was later accorded but that he was actually advised by someone in the formulation of his request.

The file was forwarded to the Appeal Board and thence to the Hearing Officer. Defendant appeared before the Hearing Officer with several witnesses. Following the hearing, the Hearing Officer concluded that defendant was conscientiously opposed to combatant and noncombatant duty by reason of religious training and belief and recommended a I-O classification. The Department of Justice concurred and on April 29, 1953, recommended to the Appeal Board that defendant be classified I-O. On May 28, 1953 the Appeal Board by unanimous vote classified defendant I-O.

Defendant was furnished SSS Form No. 152 (Special Report for Class I-O Registrants) which he filled out and returned to the Local Board June 19, 1953. In due course he was assigned to civilian work at Mount Alto State Tuberculosis Sanatorium at South Mountain, Pennsylvania. He accepted the assignment and reported for work on December 15, 1953. After serving less than a month he quit work and left the Sanatorium on January 10, 1954, stating that his employment there limited him in the performance of his ministerial work.

Defendant now claims:

(1) The Local Board denied him procedural due process when it refused him the right to discuss his ministerial status.[1]

[1] The file indicates that at no time was any formal request made for a ministerial classification, although apparently there was some discussion before the Board.

(2) The Local Board denied him procedural due process in failing to post notice of the names and addresses of advisors to registrants in a conspicuous place in the office of the Board.

(3) The order of the Local Board to perform civilian work at the State Sanatorium and Sections 1660.1 and 1660.20 of the Selective Service Regulations are in conflict with the Act because the work is not national or federal work as required by the Universal Military Training and Service Act.

(4) The Act and Regulations violate the Thirteenth Amendment to the United States Constitution.

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the Universal Military Training and Service Act, § 6 (j), 50 U. S. C. A. App. § 456(j), providing for assignment of conscientious objectors to civilian work contributing to the maintenance of national health, safety or interest, authorized assignment of objector to institutional work with county department of charities and that the statutory provision as thus applied did not violate either the Fifth or Thirteenth Amendments of the United States Constitution. The Court of Appeals (9 Cir., 220 F. 2d 278) affirmed and certiorari was denied (349 U. S. 939).

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Section 1604.41 of the Selective Service Regulations as originally promulgated and effective during the period involved in this case read as follows:

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> Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

On February 3, 1955, this section was amended by changing the fourth word in the first sentence from "shall" to "may," so that presently the appointment of advisors to registrants rests in the discretion of the Director.[3]

It is the undisputed testimony of the defendant that the list of advisors was not published as provided for in the Regulations. The requirement of publication is not constitutional in origin but rather is derived solely from the Universal Military Training and Service Act and the Regulations issued thereunder.[4]

In appealing from I-A classification defendant said:

> "I am, therefore, appealing my classification of I-A to that of a conscientious objector available for civilian work contributing to the maintenance of the national health or safety."

He was given that classification; he did prepare and file with his Local Board SSS Form No. 152 (Special Report for Class I-O Registrants); he accepted the assignment and reported for work and after serving less than a month, he quit; and he now complains that he was not apprised of the names and addresses of advisors whom he might have consulted. Having received the very classification that he asked for, defendant was not prejudiced by the failure

[3] E.O. 10594, 20 F.R. 735, Feb. 3, 1955.

[4] United States of America v. Thomas Louis DeLime III, 3 Cir., 223 F. 2d 96.

of the Local Board to publish the list of Selective Service advisors, as provided by the Regulations.[5]

Defendant's motion for judgment of acquittal will be denied.

September 29, 1955

(s) FREDERICK V. FOLLMER
United States District Judge

[5] United States of America v. Thomas Louis DeLime III, supra. Counsel for defendant relies heavily on William Chernekoff, Jr. v. United States of America, 9 Cir., 219 F. 2d 721. Under the facts of the instant case I feel Chernekoff has been completely answered by DeLime.